

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
BEFORE THE HONORABLE PEGGY A. LEEN
U.S. MAGISTRATE JUDGE

ORACLE USA, INC., a :
Colorado corporation; :
ORACLE AMERICA, INC., a :
Delaware corporation; and : No. 2:10-cv-0106-LRH-PAL
ORACLE INTERNATIONAL :
CORPORATION, a California : July 17, 2012
corporation, :
Las Vegas, Nevada
Plaintiffs, :
vs. :
RIMINI STREET, INC., a :
Nevada corporation; and :
SETH RAVIN, an individual, :
Defendants. :

TRANSCRIPT OF MOTION HEARING

APPEARANCES:

For the Plaintiffs: KIERAN P. RIGGENBERG
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FTR No. 3B/20120717

(Transcript produced from digital voice recording;
transcriber not present at proceedings)

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1 LAS VEGAS, NEVADA, JULY 17, 2012, 1:46 P.M.

2 --oOo--

3 P R O C E E D I N G S

4

5 THE COURT: Good afternoon. Please be seated.

6 THE CLERK: Your Honor, we are now calling the
7 motion hearing in the matter of Oracle USA, Inc., versus
8 Rimini Street, Inc.

9 The case number is 2:10-CV-0106-LRH-PAL.

10 Beginning with plaintiffs' counsel, Counsel,
11 please state your names for the record.

12 MR. RINGGENBERG: Kiernan Ringgenberg from
13 Boies, Schiller & Flexner for the plaintiffs.

14 Also here from Boies, Schiller is Darien Meyer
15 and Richard Pocker.

16 MR. RECKERS: Good afternoon, Your Honor. Rob
17 Reckers for the defendants, Shook, Hardy & Bacon.

18 With me is Wes Allen and Trent Webb.

19 THE COURT: This is --

20 MR. MAROULIS: And, Your Honor, on the telephone
21 is James Maroulis from Oracle for plaintiffs.

22 THE COURT: All right. This is set for hearing
23 on the motion for an adverse inference and other evidentiary
24 sanctions for spoliation.

25 I have read the moving and responsive papers.

1 But this is your time for oral argument.

2 I'll hear from Oracle, the movant, at this
3 time.

4 MR. RINGGENBERG: Thank you, Your Honor. We
5 have put together -- tried to address what we think is the
6 key issue. Four pages of demonstratives that, with Your
7 Honor's indulgence, I would like to hand up. Would that be
8 okay?

9 What we know and what's undisputed is that in
10 January of 2010 Rimini Street anticipated this litigation.
11 And at that time, two fairly senior employees took it upon
12 themselves to delete a central repository of software.

13 THE COURT: Ms. Williams and Mr. Chiu?

14 MR. RINGGENBERG: That's correct. And that that
15 material is relevant.

16 Those three facts are not disputed. And those
17 make out spoliation. The question is what do we do about it.
18 What's the remedy?

19 And there's two types of information that the
20 library created that we no longer have access to. One is
21 its contents; that is, what software was there. And the
22 second is the metadata, which showed -- according to a
23 declaration that Rimini submitted, at the very least,
24 would show the dates on which particular files were copied
25 into the library and the last access date, meaning the

1 date which the file was last copied out of the library
2 into another location.

3 And those pieces of metadata would be
4 extremely important to addressing some disputed facts.
5 And it's for that reason that the stipulation that Rimini
6 proposes is insufficient to address the prejudice that
7 Oracle would suffer and accordingly why the full remedy
8 that we've asked for --

9 THE COURT: Well, let me stop you.

10 MR. RINGGENBERG: -- is appropriate.

11 THE COURT: It's inadequate with respect to the
12 metadata issue.

13 Is it adequate or inadequate with respect to
14 the contents of the library?

15 MR. RINGGENBERG: It is sufficient. The
16 stipulation that they've offered is effectively equivalent to
17 one of the three remedies we've asked for. And so to that
18 degree, that is -- what software was in the library, that
19 question -- well, there's no disagreement that, you know, if
20 they stipulate to those facts, they've addressed that point.

21 Now --

22 THE COURT: All right. That's what --

23 MR. RINGGENBERG: -- the contents --

24 THE COURT: -- I understand. I just wanted to
25 make sure that we're on the --

1 MR. RINGGENBERG: Right.

2 THE COURT: Where we're on the same page and
3 where we're still in dispute.

4 MR. RINGGENBERG: Sure. The only reason I would
5 depart from answering just with a straightforward yes to your
6 question, Your Honor, is that the contents of the library
7 plus the metadata could be useful to answering some of the
8 questions. And so the stipulation doesn't solve that
9 problem.

10 And that's what I want to talk about. Because I
11 think that's where this -- why this motion is really clear at
12 the end of the day.

13 So there's three things that we could learn
14 from the material that's been deleted that is in dispute.
15 And let me give you one clear example.

16 There is a question as to whether between June
17 and September of 2006 Rimini Street downloaded material
18 from Oracle's website, the PeopleSoft software, before
19 Rimini Street had a PeopleSoft customer.

20 There's contemporaneous evidence that senior
21 Rimini executives planned to do this and that they began
22 to implement their plans.

23 THE COURT: All right. Because you have the
24 e-mail chains, the lock -- to open the buffet, and they
25 didn't password protect it, and so it's free to download?

1 MR. RINGGENBERG: Right.

2 THE COURT: Right. And so how is that
3 significant in terms of what it is you have to prove in this
4 case?

5 MR. RINGGENBERG: Their central defense, Your
6 Honor, is that the copies that they made were covered by
7 customer licenses; that is, they were acting on behalf of the
8 customer.

9 If they downloaded the software before they had
10 a customer for that product, it couldn't possibly be
11 licensed.

12 So their witnesses have disputed whether they
13 actually did what the e-mail suggested they did. Fair
14 enough. The jury will have to resolve that question --

15 THE COURT: Okay. But carry out that line of
16 logic through its conclusion.

17 MR. RINGGENBERG: So --

18 THE COURT: If we assume that they downloaded
19 before they had customer number one, what does that mean in
20 terms of your ability to recover in this case?

21 MR. RINGGENBERG: It means that their primary
22 defense does not apply. I mean, that is -- we will prove at
23 trial -- we intend to prove at trial that in June of 2006 --

24 THE COURT: Well, or does it mean -- and this is
25 where I'm going. Does it mean that the conduct between June

1 '06 and September '06, before they had customer number one,
2 was indefensible, but they may still have a logical argument
3 or a legal argument that is for the court and the jury to
4 decide with respect to any conduct occurring after that?

5 MR. RINGGENBERG: That's correct, Your Honor.

6 THE COURT: Okay.

7 MR. RINGGENBERG: And so they downloaded
8 software that a customer would--

9 THE COURT: I mean --

10 MR. RINGGENBERG: -- pay tens or--

11 THE COURT: -- you're not claiming --

12 MR. RINGGENBERG: -- hundreds of thousands of
13 dollars for a license for without any plausible customer
14 license.

15 THE COURT: All right. But you're talking about
16 a window of time in which they had no defense. You're not
17 talking about the fact that they may have done this during
18 any discreet period of time, erasing a defense for all
19 purposes for the entire case?

20 MR. RINGGENBERG: That's correct.

21 THE COURT: All right.

22 MR. RINGGENBERG: And we have not asked for a
23 default judgment or to strike their license defense --

24 THE COURT: No, no --

25 MR. RINGGENBERG: -- in entirety.

1 THE COURT: I just want to make sure that I
2 understand you.

3 MR. RINGGENBERG: No. That's exactly right,
4 Your Honor.

5 So the first slide that I've handed up, it
6 tends to show this point; that is that Rimini's -- the
7 thrust of Rimini's opposition is they say, well, all you
8 know is some dates, you know, the creation date and the
9 last access date. It doesn't tell you what it's for, who
10 it's for.

11 And by itself, it doesn't. But you can
12 corroborate it with other evidence and, with that other
13 evidence, learn important facts. And so this is one case
14 in point, which is there is a dispute. When do they start
15 downloading?

16 Well, if the metadata existed, you could look
17 at the file and see when was that placed in a library? If
18 it was placed in that library in June '06, clearly their
19 witnesses are testifying falsely and the e-mails are
20 correct.

21 And it's possible the metadata would show they
22 actually downloaded as consistent with the CEO's
23 testimony. But we'll never know the answer to that
24 question. It's not speculation to suggest this evidence
25 could support this.

1 And to the contrary, the Ninth Circuit law
2 clearly says if a litigant is on notice that information
3 is relevant and they don't preserve it, the appropriate
4 inference is it would support the other side. And that's
5 exactly what we've asked.

6 THE COURT: If it was willfully destroyed or
7 deleted?

8 MR. RINGGENBERG: Correct. And I don't think
9 there's any dispute about that here, with the definition of
10 willful meaning with knowledge that it's potentially
11 relevant.

12 THE COURT: Meaning it was done by purpose, and
13 not by mistake or accident?

14 MR. RINGGENBERG: That's right. And at a time
15 when --

16 THE COURT: And so if it's willful, then there's
17 a presumption that it would be helpful.

18 MR. RINGGENBERG: That's right. If it's -- if
19 it's willful and relevant --

20 THE COURT: And relevant.

21 MR. RINGGENBERG: And here --

22 THE COURT: And they're on notice.

23 MR. RINGGENBERG: -- willfulness and relevance
24 are conceded, Your Honor.

25 So the only question is, you know, what's the

1 right outcome. And here, I think on this point, it's very
2 clear.

3 So this point about when the downloading began
4 is not trivial at all. And this evidence is extremely
5 powerful and will be to the jury.

6 And if they can say, yeah, well, I know the
7 e-mails said that, but we never really did it, we'll be
8 prevented at trial from showing that their CEO is
9 dishonest in saying that.

10 And the remedy would partially address that,
11 by telling the jury they can infer from the deletion
12 that --

13 THE COURT: Okay. But how does -- if you have
14 the ability to adduce evidence of this spoliating conduct,
15 coupled with what the e-mail says, how doesn't that put you
16 in the same seat, as it were, as a judicial instruction
17 that's saying -- that's saying -- that's saying what the
18 cases call a bad act or instruction?

19 MR. RINGGENBERG: I -- I'm not sure I understand
20 Your Honor's question. That is if we just presented to the
21 jury the deletion --

22 THE COURT: You have the --

23 MR. RINGGENBERG: -- and allowed them to draw
24 their own inference from it?

25 THE COURT: Correct. You have evidence of the

1 spoliating conduct. You have evidence of -- in the records
2 that have been produced, that show what you think happened.
3 And you -- by contrast, you have the testimony which doesn't
4 own up to the documents and the e-mail exchanges that have
5 been produced in the way that you think Rimini should.

6 How doesn't that put you in the same position in
7 terms of creating the impression before the jury without the
8 Court's *imprimatur* on it?

9 Because I'm looking at what's the fair thing
10 to do in the overall scheme of things.

11 MR. RINGGENBERG: I understand, Your Honor. And
12 I think we could try to let the jury sort it all out. But
13 the Ninth Circuit guidance is that an adverse inference
14 instruction serves two purposes; one of which is to
15 ameliorate the prejudice to the complaining party, and the
16 other --

17 THE COURT: And that's where I'm going, is if
18 you get all this other stuff in, doesn't that ameliorate the
19 prejudice? And you're going to put it in anyway; right?

20 MR. RINGGENBERG: Presumably. To the extent the
21 Court allows.

22 Now, I could see a ruling that says we're not
23 going to have a side show about this. Now, I think that
24 would not be the correct ruling in this case, but the trial
25 judge might well --

1 THE COURT: No, but that's --

2 MR. RINGGENBERG: -- make that decision.

3 THE COURT: -- one of the sanctions that I have
4 available. That's one of the arrows in my quiver and one
5 that the *Zubulake* court, for example, has adopted from time
6 to time as something that -- and it is collateral in a sense.
7 But, on the other hand, you're arguing this to show
8 willfulness and to show that the testimony of the deponents
9 is not worthy of belief, so that there's also -- it's not
10 strictly a collateral issue in this case.

11 MR. RINGGENBERG: I agree. I mean, certainly we
12 think this is relevant, the fact of the deletion and the
13 history is relevant to our -- there's no question about that.

14 I would not want to be whipsawed in that, to
15 have Your Honor rule that we don't need an adverse inference
16 instruction. Because you can tell the jury and then have --

17 THE COURT: And then have the trial judge say
18 not so fast.

19 MR. RINGGENBERG: Exactly. So -- and that is a
20 concern. So let me address it another -- so that the first
21 purpose of an adverse inference instruction is to address
22 prejudice suffered by the complaining party.

23 The second is as a deterrent. And here we
24 have a clear breach of illegal duty conceded. And it's
25 appropriate to -- in evaluating what the right outcome of

1 it is, to consider what the impact of the future party
2 will be.

3 I don't disagree with Rimini that an
4 instruction will be prejudicial to them in the sense of
5 the jury will be actually instructed that they did
6 something wrong. But that's not unfair prejudice. That's
7 truth. It's accurate. And it's what the law requires.

8 It's true that some cases outside the circuit
9 have looked more askance at an adverse inference
10 instruction.

11 But under the Ninth Circuit authority in the
12 *BIC* case, for example, it's very clear that if you
13 establish willful destruction of relevant evidence,
14 adverse inference is appropriate. It --

15 THE COURT: At a time when the adverse party is
16 on notice?

17 MR. RINGGENBERG: Correct. And all those things
18 are met here.

19 And so the -- so I think the deterrent value
20 alone is reason enough to choose an instruction over
21 letting the jury sort it out.

22 Let me offer you another practical reason,
23 which is this is going to be a fairly complex trial in any
24 event, because the technology is complicated, the conduct
25 is complicated, you have a lot of experts to talk about

1 the various versions of software and downloading and --
2 there's a lot for the jury to get through.

3 To add on top of that a question about what
4 was deleted and what would have been there I think is
5 going to expand the trial and might be the straw that
6 broke the camel's back, or might be a bridge too far to
7 keep this thing manageable. At least it would make it
8 less manageable than it otherwise would be.

9 It's certainly within --

10 THE COURT: Well, which is why I started off,
11 because aren't you really going to try to pound this into the
12 jury, is that they -- in cross-examining their key witnesses
13 that are involved in this whole dispute, that you deleted the
14 evidence that would be used to support your position or --
15 and so why should we believe you, that you did this or you
16 did not do this?

17 MR. RINGGENBERG: I certainly cannot rule out
18 the possibility that if they testified that they didn't do
19 something and there's evidence that they did, we would use
20 that, including the deletion. I certainly think that's
21 relevant.

22 THE COURT: And you're not going to bring out
23 the four times in the pleadings on file in this court that
24 they denied the existence of the software library at all,
25 said it never existed?

1 MR. RINGGENBERG: I -- I think that the jury
2 probably ought to hear about that.

3 THE COURT: Right.

4 MR. RINGGENBERG: So -- but let me say -- let me
5 give you this specific example of the 75 or so copies, the 75
6 environments.

7 THE COURT: And that's down from 143 that you
8 talked about in the initial motion.

9 MR. RINGGENBERG: That's right.

10 THE COURT: And the reason you -- because you
11 acknowledge that some of those are impossibilities, you'd be
12 asking me for an instruction that you knew was false?

13 MR. RINGGENBERG: I would say -- we hadn't put
14 two and two together. If I had seen -- it was an error on
15 our part not to put two and two together and to do that.

16 In our defense, Your Honor, the presumption we
17 asked for is rebuttable, so they could certainly explain
18 to the jury why it -- why we were wrong and why, in fact,
19 those copies were made. And there would be no --
20 honestly, that might be a better trial strategy for them.

21 And so in cutting down our claim, I think we
22 may have made it stronger. And so I apologize to the
23 Court for not catching that, which now -- which I did not
24 do. I mean, certainly we want to be --

25 THE COURT: No, but it means you didn't mean to

1 request the relief that you actually requested in your
2 initial motion?

3 MR. RINGGENBERG: We asked for relief that we
4 thought was appropriate and been shown that some of the --
5 some of the copies were not -- there was evidence that some
6 of the copies couldn't have been the result, we were happy to
7 meet them in the middle and say, okay, we'll keep it to those
8 that there's no dispute about.

9 We may have claims that some of those other
10 environments were actually created from the library,
11 either a prior time or in a way that is contrary to the
12 representations they've made. And I'm not going to give
13 up that claim at trial. But today we're not attempting to
14 do that. So it is limited to that 75 or so.

15 So that's a fairly complicated question. And
16 let me try to explain quickly why that inference is
17 appropriate. And I think it will also help explain why it
18 is -- it's helpful for the Court to resolve this now
19 rather than just let the jury sort it out.

20 So the second slide shows that -- correlations
21 between two sets of dates, okay. The first set of dates
22 is the dates when customers are onboard. That means the
23 dates when the customers first came on to Rimini Street.

24 And so the general process, according to the
25 deposition testimony, is when they show up, we get copies

1 of their CDs, and if the material is not in the library,
2 we load them into the library.

3 So if you know that a particular piece of
4 software was loaded on a day in 2007, and you know that
5 that was the time that a customer was coming onboard who
6 had that same version of software, there's a very strong
7 inference that that's where the software came from, by
8 correlating those two dates.

9 We don't know that the red dots are still in
10 the record because we can establish, through
11 contemporaneous evidence, when customers came onboard to
12 Rimini Street. But we will not know and cannot know the
13 creation date metadata because it's been destroyed. So we
14 can't do that correlation.

15 Rimini Street claims to be unable to identify
16 the source of software for these 75 environments. And
17 there's some spotty evidence about it that we could use at
18 trial, but it's hardly complete. So that's step one,
19 where did the software come from.

20 The next step is where did the software go to?
21 So the next slide is -- the other piece of metadata, this
22 material which they've conceded, is access date. That
23 means the last time the software was copied.

24 THE COURT: Right. And you don't have a dispute
25 anymore. It's not going to show every time it was accessed.

1 It is going to show the last access date.

2 MR. RINGGENBERG: That's right. And so -- and
3 let me show you how we can -- what we can prove with that.
4 And that's -- is it indefeatable proof? No, but it's
5 relevant evidence that we could present at trial that we no
6 longer have.

7 If you have a series of environments that are
8 created from 2006, 2009, and you have an access date that
9 matches one of those environments -- so, for example, if
10 you know an environment was built in July of 2008 and you
11 know that there's a -- for a particular version of
12 PeopleSoft, and there's software in the library, the same
13 version, and it has an access date that matches the
14 creation date, it's a reasonable inference, it's pretty
15 good evidence that when they built that environment they
16 copied that software. That's what their process was.

17 So we could prove that at trial. We're
18 lacking that proof. And we've been prejudiced in that
19 regard.

20 So the last step is to put all those things
21 together. And that's slide four. So if you know where
22 software came from by correlating the dates, software in
23 the library, creation date February 2007, customer came
24 onboard in 2007 with that version, if you could
25 establish -- you have a reasonable basis to establish that

1 the software in the library came from that customer.

2 Then you have three environments built
3 subsequent to that that had the same version of software,
4 the third of which has a matching access date, so that you
5 have a reasonable basis to assume the third of the three
6 was created using that software. That's pretty good proof
7 that the third was created. And it's also not bad proof
8 that the preceding two were, as well, because it's
9 consistent with the evidence.

10 So maybe the way to -- the way of an analogy
11 is to say if you can establish a pattern and that
12 something was done three times, and the third one matches
13 up exactly with the conduct we allege is illegal, and
14 attempt to -- you know, have a pending motion for summary
15 judgment on that point, it stands to reason that the
16 preceding two were, as well, because they've testified
17 that was their general practice.

18 So if -- we believe that that is far more than
19 speculation, far more than a fertile imagination as to
20 what the evidence would have proved and why it would have
21 supported Oracle's claims. And that's more than an
22 adequate basis to award the rebuttable presumption for the
23 75 or so environments that we've requested.

24 And if we were forced to try to explain all
25 that to the jury, it's both a bit of a side show and,

1 arguably, time wasting and would not serve the -- fully,
2 the deterrent value that the Ninth Circuit has recommended
3 of spoliation.

4 So that's why, Your Honor, I respectfully
5 submit that -- that the instruct -- what we regard as
6 modest remedies that we proposed are the right answer in
7 this case.

8 THE COURT: Thank you, sir.

9 MR. RINGGENBERG: Thank you.

10 THE COURT: And who will be addressing the
11 defendant's position? Mr. Reckers?

12 MR. RECKERS: Yes, Your Honor.

13 THE COURT: Yes, sir?

14 MR. RECKERS: There are two categories of
15 allegations that Oracle raises in its briefing.

16 The first category they've lodged a number of
17 allegations of misconduct and dishonesty against a whole
18 host of Rimini personnel. Counsel didn't address those
19 allegations.

20 I would like to briefly, before the Court,
21 sort of point out some factual matters because I don't
22 want overhanging the decision on this issue determination
23 that Rimini was being dishonest, either its witnesses or
24 its pleadings.

25 Oracle says in their reply brief at page two

1 that Rimini is now claiming for the first time to -- that
2 we made a complete record of these files and that we never
3 explained why these files, this complete record was not
4 produced or identified in the discovery responses.

5 I'd just like to bring to the Court's
6 attention -- this issue has only come before the Court
7 once before, and that was in November at a CMC. And we
8 have a CMC statement from that hearing.

9 And it says, specifically as to that folder,
10 Rimini specifically documented what it was deleting, and
11 Oracle has these documents.

12 In November, which was right after
13 Ms. Williams' deposition, we did disclose to the Court and
14 to Oracle that we document the contents of this folder.
15 We included the exhibits, the very evidence that we're
16 talking about now, including the record of the files'
17 conduct -- contents, which was included with Oracle's
18 briefing in their initial motion as Exhibit 50, which is
19 an e-mail from October of 2011, where we again -- we
20 identified the contents of this file.

21 So we produced it during discovery. It was
22 before the [indiscernible] discovery. We have not changed
23 our position on this.

24 They say a host of our witnesses weren't
25 truthful at their depositions. I think, by way of

1 context, this is one file -- one folder on a file system.
2 Only an isolated number of employees would have been
3 working with it. The primary employee who worked with
4 this file is Ms. Williams. And she --

5 THE COURT: The one who requested the deletion.

6 MR. RECKERS: She was. Absolutely. And at her
7 deposition she testified fully and accurately about the file.

8 I'm not disputing that obviously it was
9 deleted during a time period that Rimini was under a legal
10 obligation to preserve. It's really a question of whether
11 any of the other witnesses -- or any of the witnesses were
12 dishonest. She is the witness who was presented.

13 THE COURT: So what, if any, preservation
14 efforts -- and perhaps you've told me this. And this has
15 been a very long case, and I've heard many, many hearings in
16 this case. So forgive me if I don't remember the details.
17 But what, if any, preservation holds were in place at the
18 time Ms. Williams deleted these materials?

19 MR. RECKERS: There was a hold notice that was
20 issued by Rimini's management to people -- to managers and
21 other employees such as Ms. Williams in May of 2009. Excuse
22 me one second.

23 So just for the record, document number 91 was
24 a previous declaration that I filed in October 2010. And
25 it details at page two a hold notice that was issued by

1 Rimini's management that should have covered this, should
2 have covered this file.

3 There wasn't litigation at the time, but it
4 was -- it was anticipated. And I don't have an
5 explanation as to why this folder was deleted despite the
6 hold notice.

7 I will say it's a -- almost a unique
8 situation, or at least a rare one, where we have e-mails
9 from the people who are doing the deletion, talking about
10 why they are doing the deleting, making a record, the
11 record that we now have, Exhibit 50, of what was in the
12 folder.

13 So, again, I don't need to -- I'm certainly
14 not questioning the fact that they were under a legal
15 obligation. I would say that it wasn't in bad faith. It
16 wasn't to secure a litigation advantage.

17 We have their e-mails. We can judge their
18 state of mind based on those e-mails. And of course, you
19 know, we all can read them. None of us were there. It
20 seems to me that it's very plausible for them to
21 suggest --

22 THE COURT: Was there anything else that was
23 deleted from your computer system at or near the time that
24 this -- these folders were deleted, or this folder containing
25 the subfolders?

1 MR. RECKERS: We don't believe so. As part of
2 the preservation effort certain files were locked down and
3 prevented from being deleted. And the best I can say is that
4 this file sort of slipped through the cracks, if you will.
5 Because not many people, I don't believe, knew about it. And
6 so it wasn't locked down in a way.

7 So we have a ton of evidence, you know, over
8 six million pages and a hundred thousand files that were
9 preserved, and they've been produced in this case. This
10 folder, notwithstanding the preservation efforts,
11 notwithstanding the --

12 THE COURT: Which leads to the question, why was
13 it so important to delete this or, you know, the --
14 particularly the legitimate reason for it was that you needed
15 to free up some space. How much space are we talking about?
16 And since you had locked down whole categories of zillions of
17 documents -- obviously I'm being -- engaging in hyperbole
18 there. But why is it that just this gets destroyed?

19 MR. RECKERS: Your Honor, I really can't answer
20 that. But I will say the things that were locked down
21 generally were things that were being used. The real
22 difference with this particular file was it wasn't being used
23 anymore.

24 It was obsolete. It was a file -- for example,
25 one of the things that was locked down were the silos of the

1 customer-specific downloads. Rimini employed, as part of the
2 preservation effort in 2009, a mechanism so nothing could get
3 deleted out of those.

4 And those are active files that people were
5 accessing on a regular basis. This is part of operations.
6 The main difference between those files that were locked
7 down in this particular folder was use. No one was using
8 this folder anymore. It had become antiquated based on
9 changes in Rimini's procedures.

10 Again, I mean, really the only thing I can
11 point to is the evidence that was made at the time. They
12 made a record of --

13 THE COURT: They weren't trying to hide it --

14 MR. RECKERS: Well, yeah, if --

15 THE COURT: -- is what you're saying?

16 MR. RECKERS: -- they were trying to hide it, I
17 don't -- I don't think they would have made -- taken a
18 screenshot of what it was that they were deleting. And we
19 can tell clearly what it was.

20 Oracle claims prejudice. They put in their
21 motion, you know, how it corresponds to the registered
22 works, how the files correspond to the registered works.
23 And it's consistent with the testimony.

24 And that's what the proposed stipulation
25 shows, hey, look, these are the files that were deleted.

1 These are the register -- these are the software. We'll
2 stipulate to it.

3 Rimini has stipulated to hundreds of copies of
4 Oracle's software --

5 THE COURT: Well, you've offered to stipulate.
6 They haven't offered to accept it. Nor has the Court
7 endorsed your stipulation in the form of an order.

8 MR. RECKERS: Yes, Your Honor. Yes, Your Honor.

9 We've offered to stipulate as we have -- as
10 we've admitted in the request for admissions to hundreds
11 of other copies.

12 So the question of what Rimini has copied is
13 something that I think we have a record in this case of
14 being open to a stipulation or admissions to.

15 Yeah, I don't think it makes any sense for us
16 to admit to all these other copies but for some reason
17 want to delete this one set of Oracle material under the
18 system.

19 If I could, I wanted to address the
20 allegations regarding Rimini's answer. Rimini, in their
21 answer, responds as specific denial regarding library.

22 And as answers go, we are obviously -- Rimini
23 is obviously responding to a specific allegation in
24 Oracle's complaint. It's an allegation -- the allegation
25 that they're responding to is from paragraph 50 of

1 Oracle's complaint. And that is an allegation directed to
2 downloaded support material.

3 And that's key because Rimini -- it's true.
4 Rimini does not have a library of downloaded support
5 material as described in paragraph 50 of Oracle's
6 complaint. What we're talking about here is installation
7 media. So Oracle distributes installation media different
8 than the support material. It's licensed differently. We
9 have different defenses.

10 So it's true that Rimini denied, and correctly
11 so, the allegations in paragraph 50 regarding a library of
12 support material.

13 And we have the dispute as to what the import
14 of Rimini's in store of installation media is. And
15 there's going to be different defenses. And I think
16 we'll -- it will be addressed on the merits differently.
17 But I didn't want to leave it --

18 THE COURT: And your point was you don't believe
19 that you have misrepresented the nonexistence of the library
20 because it wasn't adequately defined in the pleadings as such
21 that you had to admit it?

22 MR. RECKERS: I wouldn't quite say it that way.
23 I would say that the allegation that we were denying as to
24 the library was to the support downloads.

25 The complaint -- I'm sure it's been a long time

1 since Your Honor looked at the complaint, but it has a -- it
2 has some very specific allegations about download being
3 support material from your -- from Oracle's website with
4 automated crawlers and other types of alleged improper tools.

5 What we were denying in that specific denial
6 at issue was using the website and whatever tools Rimini
7 had to generate a library of that material. As Oracle
8 offers on its website, it is basically a knowledge base on
9 Oracle's website.

10 The -- what Oracle is using -- the term I
11 bring up in a much broader way, in trying to use our
12 denial as to a specific allegation in the complaint at
13 paragraph 50, to say that we didn't have any non-client
14 specific folders on Rimini's system. And that's never
15 been our position in litigation.

16 In fact, in Rimini's responses to
17 interrogatories, number 24 and number 25, we list out
18 eight different folders which had Oracle support material
19 that was not stored in client-specific ways. So we, in
20 the course of discovery, have disclosed where we had
21 files, where we had Oracle sworn material, in non-client
22 passage places.

23 In the case of this particular folder, it was
24 installation media, which is different than what we were
25 denying in the answer.

1 So I don't want to leave the Court with the
2 misimpression that the answer was misleading or that we
3 were denying anything that could be called a library in
4 general. That's not their intention.

5 We'll get into, I think, at trial or in the
6 merits what a library is. So that term, I think, may not
7 be best to describe this file store. But I don't think we
8 need to get into that today.

9 And those are really -- I mean, those are the
10 key, I think, allegations of misconduct. The failure to
11 disclose in discovery, which I think I've shown in the
12 case management conference statement from November, We did
13 disclose this. We addressed the answer and addressed the
14 witness testimony.

15 So now we get to the merits of the request for
16 sanctions. We -- I think where we are is that we have two
17 types of metadata that we are left with, the date created
18 and the date last accessed metadata. And from an
19 evidentiary standpoint, what did we do to deal with their
20 deletion?

21 So let me break it down. Let me start with
22 the date created. It's true that there are some e-mails
23 in this case that suggest that there might have been
24 downloads, at least contemplation of downloads, before the
25 first PeopleSoft customer. This is -- these are downloads

1 that were done perhaps in mid 2006, where the first
2 PeopleSoft customer didn't come on until the fall of 2006.

3 And here's the problem with Oracle's theory,
4 however. For their spoliation theory to be true, they
5 have to assume -- it has to be true that not only were
6 those files downloaded, which there's no direct evidence
7 of, but that they were put, out of the thousands of
8 folders on Rimini's system, into this one folder, where
9 they remained with the same metadata for years and years
10 until being deleted in 2010.

11 Now, I would suggest to you that that is
12 highly speculative. These files, if they were even
13 downloaded, could have been put anywhere. They could have
14 been deleted far before the litigation was contemplated.
15 Again, this would have been in '06.

16 So for them to advance what I would suggest is
17 a theory of relevance based on pure speculation -- courts
18 in this district and circuit and throughout the country
19 have rejected such basis of a sanction on -- based on such
20 speculation.

21 Really what we have here is they have the
22 evidence. They have -- they have the e-mails. And they
23 are free to cross-examine the witnesses and ask them if
24 they downloaded those files.

25 They have the evidence of the deletion. It is

1 something that Ms. Williams testified to. They have that
2 evidence. They can, at trial, present their case as to
3 whether or not there were early 2006 downloads of
4 PeopleSoft support material.

5 Second, the -- the second category of
6 information that they assert could be relevant in this
7 case, it is the date last accessed. Now, I think it's
8 important to notice, it's not date last copied. You don't
9 know whether or not there's actual copying done on a
10 certain date. You just know that it was accessed.

11 So it could have been accessed for any purpose
12 other than -- I mean, it does not necessarily need to be
13 accessed for purposes of copying the software to, for
14 example, create the environment. So where does that
15 leave --

16 THE COURT: Of course. But whatever reason --
17 what other reason would there be?

18 MR. RECKERS: Well, you could access --

19 THE COURT: Why -- I mean, why do you just want
20 to go in and look at an old library copy of something?

21 MR. RECKERS: Well, you know, typically you
22 would save your installation CD if you have to do a
23 reinstall. So, for example, if they have an existing
24 environment that needs to be reinstalled, they could go in
25 and reinstall the environment from that installation media.

1 At the same time, they might be building --
2 rebuilding -- or building a new environment. You don't
3 know which of the two is being -- it's being accessed for.
4 You could be -- they could be going through and looking to
5 see what they have in inventory.

6 I think really if you look at Oracle's
7 counsel's charts, they -- they could be helpful. But what
8 you have to imagine is, instead of having five customers
9 that are coming onboard, being onboard in 2007, 2008, you
10 actually had hundreds. And so instead of A, B, C, D, E,
11 and F, you would have one through 200. And you wouldn't
12 just have dates. You would have ranges. It took weeks
13 and weeks to onboard.

14 So you would have all of these overlapping
15 dates on the lines. And how would those correlate to
16 creation dates or even dates of use? You would just have
17 a huge range of potential environments that a piece of
18 software could have been accessed in connection with.

19 You really wouldn't know what it was being
20 accessed for, who it was being accessed for. Even if you
21 had dates that you could try to match up, there would be
22 too many different variables and too many different
23 options.

24 It would be, I would suggest, highly marginal,
25 very marginal correlation that would not truly

1 prejudice -- even if we had this information, Oracle would
2 not be prejudiced by it. It is not prejudiced by the lack
3 of such data, given the fact that these are the
4 on-boarding ranges, and these are dates of last access,
5 not dates of last use. We don't know, and we couldn't
6 know, what actually they're referring -- what these access
7 dates were actually referring to.

8 So, again, it's a matter of using these
9 examples. We added -- we added a large number of
10 additional customers. We took the build dates and
11 stretched out the time period. Some of these builds took
12 months. And we simply are left with the question of what
13 does that correlation mean? I would submit that it would
14 have very low relevance and be -- its probative value
15 would be minimum.

16 Given such, I would submit that Oracle is not
17 prejudiced by the lack of these two pieces of metadata.
18 The case can be tried squarely on the basis of the
19 evidence that Rimini has produced and did preserve.

20 And unless the Court has any questions, I
21 request that Oracle's motion be denied.

22 THE COURT: Will you acknowledge that as the
23 term is defined in the Ninth Circuit, the destruction of the
24 file was willful?

25 MR. RECKERS: Yes, Your Honor.

1 THE COURT: And isn't the law in the Ninth
2 Circuit that a willful spoliation creates a presumption that
3 deleted evidence would have supported the adverse party's
4 claims?

5 MR. RECKERS: I think, Your Honor, that what we
6 have --

7 THE COURT: The question, isn't that the law in
8 the Ninth Circuit?

9 MR. RECKERS: I believe so.

10 THE COURT: All right. And so then the question
11 is, what's the appropriate sanction?

12 MR. RECKERS: Yes, Your Honor.

13 And I believe that I have the burden to prove
14 lack of prejudice, which we have attempted to do in our
15 motion. Lack of prejudice beyond the stipulation that
16 we've proposed.

17 THE COURT: And what about the deterrent effect
18 of deterring parties spoliating evidence when they are on
19 notice of potential litigation?

20 In this case it's not even close because you
21 had a litigation hold. You were advising your investors
22 that you were about to be sued or that -- and you were
23 giving Oracle notice that you thought what they were doing
24 was anti-trust violation. And you knew exactly what their
25 claim was about cross-use at the time this information was

1 destroyed.

2 MR. RECKERS: Yes, Your Honor. And I'm not
3 disputing anything that you said. I think there's a question
4 as to bad faith and whether or not these individuals deleted
5 this file --

6 THE COURT: The Ninth Circuit doesn't require
7 bad faith for --

8 MR. RECKERS: And they --

9 THE COURT: -- an adverse for inference
10 instruction.

11 MR. RECKERS: I don't --

12 THE COURT: But it's a factor to take into
13 account in determining on the continual of sanctions that the
14 Court has authority to impose what's the fair thing to do.

15 MR. RECKERS: Exactly. And that's my only
16 point. When you start talking about the deterrent effect and
17 punitive measures, I think that is where the intention of the
18 actors comes into play.

19 I think that's where it would spot in here, you
20 know, how much do you weigh the deterrent effect in this
21 particular instance when you have, you know -- again, I
22 wasn't there. We have e-mails from the time period where
23 they're making records and they're discussing it.

24 We can -- and the Court is obviously in a
25 position to read those and to discern to the best you can,

1 you know, what their intent was in how -- how you will -- how
2 you will factor in their state of mind.

3 THE COURT: So much was put at risk. If I'm to
4 believe you, that this was just an obsolete little file, we
5 needed the space -- so much is put at risk for so little if
6 I'm supposed to believe what your clients have to say about
7 why this was deleted.

8 MR. RECKERS: Your Honor, I mean, I agree with
9 you. But, I mean, again, all I can --

10 THE COURT: And I'm not throwing barbs in your
11 direction because I'm quite positive you're not the one that
12 counseled this conduct.

13 MR. RECKERS: That's true as well.

14 But, again, I look to the records, and I -- I
15 can't say that I believe these people were --

16 THE COURT: Sometimes, somewhere --

17 MR. RECKERS: -- being dishonest.

18 THE COURT: -- people have to get it. The Court
19 means what it says when if you know you're going to be sued
20 or there's a reasonable likelihood you're going to be sued,
21 you have to keep the stuff, even though it's inconvenient.
22 You can't go on as business as usual. People have to
23 understand that message.

24 MR. RECKERS: I understand.

25 THE COURT: Companies have to understand that

1 message. Companies have to listen to their lawyers that, I'm
2 sure, convey that message.

3 MR. RECKERS: Yes, Your Honor.

4 THE COURT: Again, this isn't personal to you.

5 And I've cut you off. Is there anything else
6 you would like to add?

7 MR. RECKERS: No. Thank you, Your Honor.

8 THE COURT: It's your motion. You get the last
9 word, sir.

10 MR. RINGGENBERG: There's a lot I could say,
11 Your Honor, but I just want to focus in on two points, unless
12 you have any additional questions, which is, one, the parsing
13 of words to defend what is in their answering counterclaim is
14 artful, but it's not supported.

15 We put before the Court an exhibit in early
16 2007 which a Rimini employee says: I've just downloaded
17 every version of PeopleSoft 8.8 and put it in the software
18 library.

19 So the idea that what they had, that -- the
20 allegation in the complaint that they downloaded material
21 and put it into a library was not what the conduct is,
22 it's not supportable based on the facts.

23 Second point is that the case for bad faith in
24 here, if you'd like to find it, lies with Dennis Chiu, who
25 cooked up the idea of the software library, wrote e-mails

1 describing how it would work, oversaw its implementation,
2 wrote numerous e-mails in which he thanked people for
3 putting material in the library; and then sat at his
4 deposition and said: I have no recollection of anything
5 like that ever happening.

6 Ms. Williams, I don't want to throw any barbs
7 at her for intentionally testifying falsely. We have some
8 disagreements with some of the things she said.

9 Mr. Chiu --

10 THE COURT: She contradicted Mr. Chiu.

11 MR. RINGGENBERG: She did. And he said he
12 didn't remember. But, frankly, Your Honor, we intend to show
13 the jury that he was lying. And I think it's an entirely
14 fair inference, from his deep involvement in the activity and
15 his complete denial of the existence of the library at his
16 deposition, not it might have existed, I don't remember, but
17 now I don't remember anything like that ever happening.

18 And he was the guy that approved this. There is
19 a record. And the record we're talking about, it's a
20 screenshot that Ms. Williams created to tell the IT guy what
21 to delete. And all it has is folder names. It's an
22 inference what was in there.

23 But there's no evidence Mr. Chiu knew that
24 would be created or certainly that he suggested it to
25 preserve a record. As far as the record reveals, that was

1 accidental.

2 THE COURT: No, but it was Ms. Williams who
3 asked for permission to delete it. So she's the one who is
4 preserving what she's asking to be deleted, which kind of
5 tells you that she's not trying to hide what she wants to
6 delete.

7 MR. RINGGENBERG: She wasn't. I think that's a
8 fair inference.

9 But she went to Mr. Chiu, who was her boss, who
10 knew that the library existed, who know the library was
11 illegal. Because he told customers that and -- which we've
12 documented to the Court.

13 So when he approved it, Your Honor, I think it
14 is a -- not only is it a fair inference, the evidence is
15 overwhelming that he did so, at least in significant part, to
16 cover the tracks of what they were doing, which they knew was
17 illegal.

18 Now, you don't have to find that. But I think
19 it's -- it would be entirely fair to find that inappropriate
20 to do so and to resolve that issue in support of the
21 sanctions that we've requested.

22 The last point I want to make. Mr. Reckers
23 argues it's speculative that the downloading in early 2006
24 would have been to this library.

25 Well, the employee, Mr. Chiu, wrote at the

1 time, we have a new employee, Ms. Torres [phonetic], and I
2 want her to, quote, download all the PeopleSoft
3 application software that is currently available on the
4 Oracle website which would help with the software library
5 we want to set up, close quote.

6 It is not speculation that the software was
7 downloaded to exactly the location that was deleted, which
8 was the same library that was maintained for this exact
9 purpose for many years. Contrary to the --

10 THE COURT: Which means you also have the
11 evidence.

12 MR. RINGGENBERG: Well, there is a dispute.
13 They say they didn't do it. We think -- we think the
14 evidence shows they did. The jury will have to decide that.

15 But if they hadn't deleted this evidence, we
16 would know the answer, or at least it's extremely likely that
17 we would, in a way that they couldn't dispute.

18 If there was a -- if there is creation date
19 metadata in the software library from June or July of
20 2006, we would have them dead to rights. And they know
21 that. But we're robbed of that evidence. And so I think
22 that's clear prejudice in addition to the environment-
23 builds material, which -- which I think is clear enough.

24 The last point Mr. Reckers makes is, well, but
25 there was a lot of customers coming on, and it might get

1 sloppy in matching up the dates. And that's a fair point
2 as far as it goes.

3 But we have to recall there's a lot of
4 different versions of software. PeopleSoft HR software
5 version 8.8, service pack 1. And, you know, there's not
6 200 customers that have that same version. It's a much
7 smaller number. So when you're trying to match up dates
8 for a particular software version, it's a lot easier.

9 Now, could we say -- can I stand here and say
10 we know with certainty what was created by what? No, I
11 don't know that. But what I do know is it would be
12 relevant evidence and that they deleted it with knowledge
13 that it would be relevant to litigation anticipated, and
14 the presumption, therefore, that it would be helpful to
15 us.

16 And I think it's a both fair and just result
17 to award the sanctions we've requested.

18 THE COURT: Do you have any quarrel with the
19 proposed form of the stipulation other than it doesn't go far
20 enough?

21 MR. RINGGENBERG: As -- no, Your Honor, we
22 don't.

23 THE COURT: All right. Thank you.

24 MR. RINGGENBERG: Thank you.

25 THE COURT: I'll enter a written decision and

1 order.

2 I'm not about to tell the district judge how he
3 should consider this in the context of summary judgment.
4 Just giving you the heads-up on that. I'm not going to enter
5 any order that says what -- how he should treat this.

6 But I will enter a decision and order that
7 provides what I think is the appropriate sanction for the
8 admitted spoliation of evidence.

9 Okay. Thank you. I appreciate the quality of
10 your arguments.

11 MR. RINGGENBERG: Thank you, Your Honor.

12 MR. RECKERS: Thank you, Your Honor.

13 (The proceedings were concluded at
14 2:33 p.m.)

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I certify that the foregoing is a correct
transcript from the electronic sound recording
of the proceedings in the above-entitled matter.



8/13/12

Donna Davidson, RDR, CRR, CCR #318
Official Reporter

Date